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Association*

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEVADA

CAPITAL ONE, NATIONAL
ASSOCIATION, a national banking
association,

Plaintiff,

v.

SFR INVESTMENTS POOL 1, LLC, a
Nevada limited liability company; and
ANTHEM COUNTRY CLUB COMMUNITY,
ASSOCIATION, a Nevada nonprofit
corporation,

Defendants.

SFR INVESTMENTS POOL 1, LLC, a
Nevada limited liability company,

Counterclaimant/Crossclaimant,

)
)
)
) Case No. 2:17-cv-00604-RFB-NJK
) consolidated with
) Case No. 2:17-cv-00916-KJD-NJK
)
) **JOINT MOTION TO EXTEND**
) **DISPOSITIVE MOTION**
) **DEADLINE AND [PROPOSED]**
) **ORDER**
) **(SECOND JOINT REQUEST)**

v.

CAPITAL ONE, NATIONAL
ASSOCIATION, a national banking
Association; LEON BENZER, an individual;
UNITED STATES OF AMERICA

Cross-Defendants,
Counter-Defendants.

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEON BENZER;
SFR INVESTMENTS POOL 1, LLC;
CAPITAL ONE, N.A.; ROCKTOP
PARTNERS, LLC; WILMINGTON SAVINGS
FUND SOCIETY, FSB, AS TRUSTEE OF
STANWICH MORTGAGE LOAN TRUST A;
ANTHEM COUNTRY CLUB
COMMUNITY ASSOCIATION; and
REPUBLIC SILVER STATE DISPOSAL INC.,

Defendants.

CAPITAL ONE, NATIONAL ASSOCIATION
a national banking association,

Counter-Claimant/Cross-Claimant,

v.

UNITED STATES OF AMERICA;
LEON BENZER, an individual;
SFR INVESTMENTS POOL 1, LLC,
a Nevada limited liability company; and
ANTHEM COUNTRY CLUB
ASSOCIATION, a Nevada corporation,

Counter-Defendant/Cross-Defendants.

1 The United States of America; SFR Investments Pool 1, LLC (“SFR”); and Anthem
2 Country Club Community Association (“Anthem”) jointly request that the Court extend the
3 November 9, 2020, dispositive motion deadline, in light of a hearing the Court has set for
4 November 19, 2020, on a disputed discovery motion. The parties ask that the deadline be
5 extended for three weeks past the November 19, 2020 hearing, to December 3, 2020, or the
6 ruling on the motion if it comes later. That is, the parties seek thirty-one days from the existing
7 deadline based on the hearing date, or such later date as the Court determines based on the
8 outcome of the hearing. This way the parties will have the benefit of a ruling on the disputed
9 discovery issues when preparing dispositive motions.

10 The Court set the November 19, 2020, hearing to address documents that Rocktop
11 Partners, LLC (“Rocktop”) and Wilmington Savings Fund Society, FSB, as Trustee of Stanwich
12 Mortgage Loan Trust A (“Wilmington”) produced after the close of discovery. (ECF No. 303
13 (motion)). All parties who have appeared in the litigation, and who are actively litigating, join
14 this request except for Rocktop and Wilmington. Capital One is in agreement with, and has no
15 objection to, continuing the dispositive motion deadline until after the hearing. The moving
16 parties respectfully submit that good cause exists for the extension, because having to submit
17 dispositive motions before a material discovery issue is resolved may result in disorderly
18 litigation, and cause the parties to have to submit supplemental dispositive briefing depending on
19 the outcome of the discovery motion.

20 **MEMORANDUM IN SUPPORT**

21 **I. BACKGROUND**

22 The two cases on this consolidated proceeding concern competing claims to the same
23 piece of real property, a home worth perhaps \$2 million. The United States asserts federal tax
24 liens on the property for defendant Leon Benzer’s overdue taxes. Anthem, Mr. Benzer’s HOA,
25 asserts that he was behind on HOA dues, and Capital One asserts that Mr. Benzer (or persons or

1 entities associated with him) was behind on two loans secured against the property. In 2013,
2 Anthem conducted a foreclosure to satisfy the HOA dues. SFR purchased the property at the
3 sale.¹

4 The United States brought one of the two suits to collect Mr. Benzer's tax debts. Capital
5 One brought the other to quiet title on the property in light of the two loans. Capital One alleges
6 that the HOA sale was invalid, and/or that the mortgage liens remain on the property. The
7 existence, amount, and priority of the two loans are thus at issue in the dispute.

8 Capital One transferred the loans to Rocktop and Wilmington during the litigation. On
9 July 16, 2020, and after discovery was to have closed but for one deposition, Rocktop and
10 Wilmington produced new documents relating to the loans. (ECF No. 295-6 (excerpts from new
11 disclosures, attaching new documents at CAPONE 01241-45)). The new documents were
12 recently created notices purporting to rescind earlier loan documents. The United States has
13 moved to exclude the documents for certain purposes, or, in the alternative, to allow discovery
14 regarding the new documents and their implications for other documents that were timely
15 disclosed. (*See* ECF No. 303). Anthem and SFR have joined. (ECF Nos. 306 and 307). The
16 Court has set a hearing for November 19, 2020. (*See* ECF No. 305). That is the motion and
17 hearing that give rise to this request to extend the deadline for dispositive motions, because the
18 hearing date is after the dispositive motions deadline.

19 As also detailed in the discovery motion, the discovery deadlines in this case have been
20 extended several times, generally by agreement among the parties. (*See* ECF No. 292 at ECF pg.
21 4 *et seq.*). The parties have usually worked to accommodate each other's schedules and to
22 ensure that the litigation proceeded in an orderly way. Thus, when Rocktop and Wilmington
23

24 ¹ None of the other parties named in the litigation have appeared. Thus, the "litigating parties"
25 have been Anthem, Capital One, SFR, the United States, and, when they were added, the new
mortgage claimants. (*See* ECF No. 214 (order directing Capital One to add the new parties)).

1 produced the new documents, the parties discussed whether to seek an extension to the
2 dispositive motions deadline to accommodate potential discovery motions concerning the
3 documents.

4 The parties also met and conferred regarding the new documents. The attorney handling
5 day-to-day aspects of the case for Rocktop and Wilmington was (reasonably) unavailable for part
6 of that period due to his wedding and honeymoon. When it became clear the scheduling issue
7 and the underlying dispute over the documents themselves could not be promptly resolved, the
8 United States raised the timing issue in an August 19, 2020, status report, and at an August 21,
9 2020, hearing on a separate discovery motion that Rocktop and Wilmington had previously filed.
10 ((ECF No. 289 at 4) (status report); ECF No. 291 (hearing)). (In fact, the other parties had
11 agreed to an earlier dispositive motions extension in part to accommodate Rocktop and
12 Wilmington's discovery motion, *i.e.*, the motion heard on August 21, 2020. (ECF No. 292 at 5-7
13 (discussing history)).

14 In response to the status report and the discussion at the hearing, the Court directed the
15 parties to propose a stipulation to address the scheduling problems, *i.e.*, "by 8/28/2020 regarding
16 the schedule in this case." (*See* ECF No. 291). The United States, Anthem, and SFR were all
17 amenable to a stipulation to adjust the dispositive motions deadline to address the new
18 documents. Capital One did not take a position. However, Rocktop and Wilmington declined to
19 agree to a stipulation to extend the schedule to allow any motions on the new documents to be
20 heard before the dispositive motions deadline.

21 As a result, the parties could not file a stipulation by August 28, 2020, as the Court had
22 directed. Instead, the United States, Anthem, and SFR, filed a joint motion to extend the
23 schedule. (ECF No. 292). Capital One did not join, but did not oppose. There was limited
24 precedent for this in the case's long history, as the parties had generally accommodated each
25 other. But it seemed unlikely that a discovery motion could be briefed, heard, and decided

1 before the dispositive motions deadline. The moving parties deemed it best to ask for
2 permission, and to clarify the schedule, rather than to file discovery motions that would disrupt
3 the schedule and then ask for forgiveness and an extension. The moving parties did not wish to
4 presume the Court would hear and decide a significant discovery motion before the dispositive
5 motions deadline ran. It seemed more appropriate to file the request and seek the Court's
6 guidance.

7 Moreover, at the time, the deposition of Capital One's Rule 30(b)(6) witness had still not
8 taken place. It had been extended for several reasons, most recently because the intended
9 witness had left the company. When Anthem, SFR, and the United States filed their scheduling
10 motion, it was still possible that the deposition of the Capital One witness would shed light on
11 the new documents and their implications for the existing record, by providing more history.
12 And it seemed possible the deposition could obviate the need for a discovery motion against
13 Rocktop and Wilmington, or at least clarify the issues. (The deposition has since taken place, on
14 September 27, 2020, but the witness had little to no knowledge relevant to the new documents.)

15 Rocktop and Wilmington opposed the motion to extend (ECF No. 295). (Confusingly,
16 the docket entry states that *Capital One* opposed the motion. However, it was *Rocktop and*
17 *Wilmington, not Capital One*. (See ECF 295 at ECF pgs. 2 and 9)). There has long been
18 confusion over whether and when the same law firm was representing Capital One, but by the
19 time of the filing, Rocktop and Wilmington's counsel had averred they had no contact with
20 Capital One and were no longer representing Capital One. They appear to have docketed the
21 entry in error.)

22 The Court denied the scheduling motion from the bench at an October 1, 2020, hearing.
23 There may have been confusion as to who opposed the motion due to the docketing error, *i.e.*, it
24 was Rocktop and Wilmington, not Capital One. There also appeared to be confusion as to the
25 documents the moving parties wished to challenge. To be clear, the documents at issue were

1 those in the July 16, 2020, production that the United States discussed in the August 19, 2020,
2 status report and in the August 21, 2020, hearing. However, the moving parties understand that
3 the Court's reasoning was, in part, that there was not good cause to extend the schedule at the
4 time because the discovery motion had not yet been filed.

5 The United States filed its discovery motion, *i.e.*, the motion to exclude and/or allow
6 discovery regarding the new documents, within one week of the October 1, 2020, hearing, as the
7 Court directed. (ECF No. 303). Anthem and SFR have joined. (ECF Nos. 306 and 309.)

8 **II. ARGUMENT**

9 Federal Rule of Civil Procedure 16 is implicated where amendment would require
10 modification of a scheduling order. That Rule provides that modifications should be made only
11 for good cause and with the Court's consent. Fed. R. Civ. P. 16(b)(4); *see also, e.g., Miller v.*
12 *United States*, 2018 U.S. Dist. LEXIS 42645, at *2 (D. Nev. Mar. 15, 2018). Local Rule 26-3
13 (previously LR 26-4) sets additional requirements, and provides that motions should be
14 submitted within 21 days of the date they seek to change, or show good cause. This motion is
15 filed October 19, 2020, 21 days before the November 9, 2020, dispositive motions deadline. The
16 Local Rule also provides that a request to extend a deadline after it has passed will not be granted
17 unless the movant demonstrates good cause and shows that any failure to act was the result of
18 excusable neglect. The moving parties respectfully submit that this aspect of the Local Rule is
19 not applicable here, as they are filing before the deadline at issue. Anthem, SFR, and the United
20 States submitted their first motion to extend before the dispositive motions deadline, and by
21 August 28, 2020, the date the Court had given the parties to file a scheduling stipulation. (ECF
22 No. 291). The dispositive motions deadline has now been reset for November 9, 2019, so this
23 motion is also before the deadline had passed.

24 The test, therefore, is whether there is good cause to grant the limited extension the
25 moving parties are requesting. Good cause applies. Rocktop and Wilmington have produced

1 documents that appear to fundamentally alter claims, defenses, and arguments previously raised
2 in the litigation. The new documents appear to call into question previously produced
3 documents that set the expiration date for at least one of the two loans at issue. (*See* ECF No.
4 303 at ECF 13-14 (discussing questions presented by new documents)). It is reasonable to hear
5 whether the documents should be excluded or further discovery granted. But the hearing on the
6 documents is not until November 19, 2020, after the November 9, 2020, dispositive motions
7 deadline. That would require the moving parties to prepare their dispositive motions without
8 knowing the status of documents that Rocktop and Wilmington apparently believe are crucial to
9 their claims and defenses.

10 The motion is the successor to Anthem, SFR, and the United States' first motion to
11 extend the deadlines, which they filed before the dispositive motions deadline was fixed. (The
12 deadline depended on the date of the Capital One deposition, and that date had not been set
13 because the intended witness had left the company.) The first motion was filed by the August
14 28, 2020, deadline the Court had given the parties to reach a stipulation—it was Rocktop and
15 Wilmington's refusal to stipulate that occasioned the request in the first place. The moving
16 parties have had to coordinate their response for this new motion, and confer with Rocktop and
17 Wilmington, who again oppose. They are filing this motion within one week of the date the
18 Court set the hearing date on which this motion turns.

19 Because the parties are filing this motion before the dispositive motions deadline, the
20 parties submit that the Local Rule's "excusable neglect" standard does not apply. But to the
21 extent that standard applies, courts have reasoned that whether neglect is excusable depends on
22 such factors as: (1) the danger of prejudice to opposing parties; (2) the length of the delay, and its
23 potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant
24 acted in good faith. *See, e.g., Branch Banking & Trust Co. v. D.M.S.I., LLC*, 871 F.3d 751, 764-
25 765 (9th Cir. 2017); *Bank of Am., N.A. v. Ann Losee Homeowners Ass'n*, 2017 U.S. Dist. LEXIS

1 165867, *6-9 (D. Nev. Oct. 5, 2017). The determination is ultimately an equitable matter, and
2 should take into account all the relevant circumstances. *Bank of Am., N.A.*, 2017 U.S. Dist.
3 LEXIS 165867 at *7.

4 Here, the factors favor the movants. There can be little cognizable prejudice to any party.
5 All parties that have appeared have consented except Rocktop and Wilmington—but they are the
6 parties who produced the late-breaking documents. It is not appropriate for a party to wait until
7 after discovery to create and produce documents that may fundamentally alter the claims and
8 defenses in the litigation, and then hold all other parties hostage by refusing to consent to a
9 stipulation to extend the schedule. The other parties ask for 31 days past the existing deadline,
10 but that time frame is tied to the date the Court set for the discovery motion hearing, *i.e.*, the
11 parties ask for three weeks past the discovery motion hearing date, depending on the outcome of
12 the hearing. Given the many times the parties have agreed to extend the schedule, frequently to
13 accommodate Rocktop and Wilmington and/or their predecessor, Rocktop and Wilmington
14 would be hard pressed to show that this time a brief extension is uncalled for. The alternative,
15 requiring dispositive motions while the discovery dispute is undecided, would cause significant
16 problems and additional expense for all parties.

17 During the meet and confer process, and in briefing on Anthem, SFR and the United
18 States' first request, Rocktop and Wilmington asserted that they could not be held accountable
19 for producing the documents out-of-time because they had not created the documents until after
20 discovery closed. But here that is a difference without distinction. As the United States
21 explained in the discovery motion and elsewhere, Rocktop and Wilmington were fully capable of
22 creating the documents during the discovery period. Indeed, the documents purport to rescind
23 earlier notices, notices that came into play in the summer of 2019, if not earlier, more than a year
24 before Rocktop and Wilmington decided to create and produce the documents. (ECF No. 303
25 (discussing history in more detail)). Rocktop and Wilmington were on notice of the issues more

1 than a year ago, and could have created (and produced) the documents then. (*Id.* at ECF pgs. 7-8
2 and 15-16). The fact they waited until after the discovery deadline to do so should not insulate
3 them from a fair hearing on the United States' motion to exclude. And it should not allow them
4 to disrupt dispositive motions briefing by leaving what may be important evidence in limbo.

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WHEREFORE, the parties jointly seek the Court's authorization and approval to extend the dispositive motions deadline from November 9, 2020, to the date falling three weeks after the Court's hearing (or ruling, if the ruling is later) on the discovery motion filed at ECF No. 303, or such later date as the Court deems appropriate based on the outcome of the hearing. That hearing is currently set for November 19, 2020.

DATED this 19th day of October, 2020.

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By: /s/ Diana Ebron

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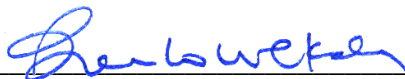
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IT IS SO ORDERED:


UNITED STATES DISTRICT JUDGE or
UNITED STATES MAGISTRATE JUDGE